

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT DAVID PERREAULT,

Defendant-Appellant.

UNPUBLISHED

May 19, 2011

No. 293324

Saginaw Circuit Court

LC No. 08-031751-FC

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). He was sentenced to life in prison for the murder conviction and a concurrent prison term of 140 months to 15 years for the child abuse conviction.¹ He appeals as of right. We affirm.

Defendant's convictions arise from the death of his four-month-old daughter, who died from a severe head injury while in defendant's care. The evidence showed that the child died from blunt force head trauma. Her skull was fractured and, according to medical testimony, the nature and severity of the injury indicated that her head struck a hard object while either the head or the object were traveling at a high velocity. Defendant did not dispute that the child was injured while in his care. He gave numerous different accounts of the child's injury to the police. His accounts changed as the police confronted him with new information about the child's condition and circumstances. At trial, defendant testified that he was holding the child while speaking on the telephone and as he went to hang up the phone, the child began to fall from his arms. He tried to catch her, but then they both fell to the floor. Defendant claimed that the child may have hit a stove as she fell, but he was not certain. Defendant did not immediately seek medical help because the child did not initially exhibit any symptoms of distress. The prosecution presented medical evidence establishing that the child's injury and condition were

¹ Defendant was acquitted of a second count of first-degree child abuse, which was based on evidence that the child suffered rib fractures a few weeks before her death.

inconsistent with a fall in the manner described by defendant and refuting his claim that the child did not show immediate signs of distress after being injured.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues through both his appellate attorney and in a pro se Standard 4 brief² that the evidence was insufficient to convict him of either first-degree child abuse or felony murder because the evidence showed, at most, that the child was injured in an accidental fall and, accordingly, was insufficient to prove that he knowingly or intentionally caused a serious injury to the child. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). An appellate court must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged crimes. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “All conflicts in the evidence must be resolved in favor of the prosecution.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *Id.* Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

As explained in *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999),

[t]he elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316]. [Citation omitted.]

First-degree child abuse is one of the enumerated felonies for felony murder. MCL 750.316(1)(b).

MCL 750.136b(2) provides that “[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.” To prove intent for first-degree child abuse, the prosecution must show that the defendant either intended to cause serious physical or mental harm to the child or knew that such harm would be caused by his or her actions. See *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004). MCL 750.136b(1)(f) defines “[s]erious physical harm” as “any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to,

² Filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.”

Defendant’s sufficiency argument is principally based on the credibility of his account of the child’s injuries, namely, that the child was injured in an accidental fall. However, the credibility of defendant’s account was undermined by evidence that he gave numerous conflicting versions of how the child was injured and that his explanations changed as he received new information about the child’s circumstances and condition. Further, the prosecution offered medical testimony that the child’s injuries were not consistent with an accidental fall in the manner described by defendant. The medical evidence showed that the child suffered a skull fracture of such severity that it could only have been caused by the child’s head striking a hard object while either the head or the object was moving at a high velocity. Although defendant testified at trial that the child may have struck her head on the edge of a stove as she fell and that he also stumbled and fell on the child, that account was inconsistent with defendant’s initial explanations to the police. Medical evidence also showed that the child did not have any outside skin wounds or bruising on her back or torso, which would have been expected if the child had fallen in the manner described by defendant. The credibility of defendant’s testimony was for the jury to resolve.

The evidence showed, and defendant did not dispute, that he was the only person who was caring for the child at the time she was injured. Given defendant’s changing explanations for the child’s injury, that defendant’s explanations were not consistent with the medical evidence, and that the medical evidence showed that the child’s skull fracture was caused by the child’s head striking a hard object while either the head or the object was moving at a high velocity, a reasonable juror could have found beyond a reasonable doubt that defendant knowingly or intentionally caused serious physical harm to the child. Accordingly, there was sufficient evidence of defendant’s intent to support his conviction of first-degree child abuse.

Defendant also argues that there was insufficient evidence of malice to support his felony murder conviction. Again, however, the medical evidence concerning the nature and severity of the child’s injury, which was inconsistent with an accidental fall, was sufficient to enable the jury to find beyond a reasonable doubt that the child died from an act by defendant that was intended to do great bodily harm or at least to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Thus, there was sufficient evidence of malice to support defendant’s felony-murder conviction.

II. DEFENDANT’S STANDARD 4 BRIEF

Defendant raises several additional issues in his Standard 4 brief, none of which have merit.

A. EVIDENTIARY ISSUES

Defendant raises several claims of evidentiary error. We review preserved claims of evidentiary error for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Any preliminary questions of law are reviewed de novo. *Id.* Any unpreserved

claims of error are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant argues that the trial court abused its discretion by allowing his former girlfriend, Celia Ricker, to testify about a prior episode of domestic violence during which defendant injured Ricker and pushed her four- or five-year-old daughter against a door when the daughter intervened in a fight between defendant and Ricker. Defendant argues that this evidence was irrelevant and inadmissible under MRE 404(b)(1), and was unduly prejudicial. We disagree.

MRE 404(b)(1) prohibits evidence of a defendant's other acts "to prove the character of a person in order to show action in conformity therewith," but permits such evidence for other, noncharacter purposes. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, the trial court declined to allow the prosecution to introduce this evidence in its case-in-chief, but later allowed the prosecution to present the evidence in rebuttal, after defendant offered testimony that he was a good person who would not harm a child. Thus, the evidence was offered for a proper purpose under MRE 401(b), i.e., to rebut the defense testimony that defendant was a good person who would not harm a child, rather than for the improper purpose of proving defendant's character to show action in conformity therewith. Although defendant argues that the evidence was not relevant, the defense testimony portraying defendant as a good father who would not harm a child made Ricker's testimony that defendant harmed her daughter relevant under MRE 401. Ricker's testimony about her fight with defendant and that he injured her during the fight was relevant to explaining defendant's conduct toward the daughter.

Defendant also argues that the evidence should have been excluded under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice does not mean any prejudice, but "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994) (citation omitted). In this case, the evidence was not unfairly prejudicial considering that it was responsive to defense testimony. Further, the trial court permitted defendant to call additional witnesses in light of its decision to allow the evidence, and it permitted defendant to retake the stand to testify regarding his own version of the incident with Ricker, thereby reducing any likelihood of unfair prejudice.

Defendant also contends that Ricker's testimony was inadmissible hearsay. Although defendant asserts that his "alleged act" (i.e., the domestic violence incident) was hearsay, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defendant

does not identify any out-of-court statement that was admitted at trial. Thus, there is no merit to this claim.

For these reasons, the trial court did not abuse its discretion in allowing the evidence of the domestic violence incident between defendant, Ricker, and Ricker's daughter. Further, because defendant denied assaulting or injuring either Ricker or her daughter, the trial court did not abuse its discretion in admitting photographs of Ricker's injuries to corroborate her testimony. See *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

Defendant also challenges the admission of photographs depicting the victim's injuries and autopsy photographs of the victim. "Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Id.* Photographs may be used to corroborate a witness's testimony and "gruesomeness alone need not cause exclusion." *Id.* (quotations and citations omitted). Further, photographs "are not excludable simply because they are cumulative of a witness's oral testimony." *Id.*

The cause and severity of the child's skull fracture was a principal issue in this case. The photographs were relevant to allow the medical examiner to demonstrate and explain his testimony and to allow the jury to understand the nature and severity of the child's injuries. Photographic evidence is permissible because "[t]he jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Id.* The record discloses that the trial court admitted the photographs only after determining that they were necessary to an understanding of the witnesses' testimony and sought to limit the number of photographs to "the least number that demonstrate what needs to be shown." The trial court did not abuse its discretion.

Next, defendant argues that the trial court abused its discretion in allowing evidence that the victim suffered broken ribs one to four weeks before her death. Defendant argues that this evidence was unduly prejudicial under MRE 403 because there was no evidence linking him to the rib fractures. However, the evidence was admissible for the simple reason that before trial, the trial court permitted the prosecution to amend the information to add a second count of first-degree child abuse based on the broken ribs. Defendant does not challenge the trial court's decision granting the prosecution's motion to amend.³ Thus, the evidence was admissible because it was the basis for one of the charges against defendant.

Defendant also argues that testimony that he admitted dropping a remote control on the child a few weeks before her death should have been excluded under MRE 403. We disagree. Evidence was presented that the child's mother noticed marks on the child's face a few weeks before the child's death. Defendant initially denied responsibility but upon being confronted, he stated that he had dropped a remote control on the child. This evidence was relevant because it showed that, like in this case, defendant was not initially forthcoming about how the child was injured and then gave an explanation that was not consistent with the child's injuries. See MRE

³ At trial, the jury acquitted defendant of this added count.

401. Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403.

Defendant challenges the admission of evidence that approximately two months before the child's death, he was found intoxicated, sleeping on a hill near a store after an argument with the victim's mother. We disagree with defendant's argument that this evidence was not relevant under MRE 401. The prosecutor's theory of the case was that defendant was experiencing a number of personal problems in his life, including his relationship with the victim's mother, and that he acted against the child because of frustration from his many unresolved personal issues. Defendant, on the other hand, attempted to portray his home life as good. The evidence in question was relevant to an understanding of the nature and status of defendant's relationship with the victim's mother and, specifically, to rebut the defense suggestion that the relationship was good and stable. Further, because the prosecutor and the trial court both made clear that the evidence was not being offered as proof of defendant's bad character, the evidence was not unduly prejudicial under MRE 403.

For similar reasons, we also reject defendant's unpreserved argument that evidence of his unemployment and financial problems was improperly admitted. As defendant correctly observes, evidence of a defendant's poverty or unemployment is generally not admissible to show motive because of its low probative value and the risk that jurors may view such a defendant as a "bad man." See *People v McLaughlin*, 258 Mich App 635, 665-666; 672 NW2d 860 (2003). However, evidence of a defendant's financial condition may be admissible in the circumstances of a particular case. *Id.* In this case, the evidence showed that defendant, who was unemployed and had financial problems, became upset when the child's mother filed a petition for child support two weeks before the child's death. The evidence of defendant's unemployment and financial problems was not presented to generally portray defendant as a bad person, but rather to show how it affected defendant's emotional status, which was central to the prosecutor's theory of the case. Thus, there was no plain error in the admission of evidence of defendant's economic problems.

Defendant also challenges the prosecutor's use of leading questions during direct examination of the victim's mother. A trial court has discretion to allow leading questions. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004). MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." The record discloses that the trial court permitted the prosecutor to ask certain leading questions because of the witness's apparent difficulty in understanding questions. Defendant has not demonstrated how he was prejudiced by any questions that were leading. Under the circumstances, the trial court properly exercised its discretion in permitting leading questions.

Further, the trial court did not abuse its discretion in permitting the prosecutor to question the victim's mother on redirect examination regarding child support that she was receiving from the father of her oldest child. The prosecutor elicited that defendant became upset when the victim's mother filed a petition for child support against him because he was aware that the victim's mother had previously filed a similar petition against her other daughter's father. To the extent defendant argues that this was an improper subject for redirect examination because the subject was not raised during cross-examination, the trial court had discretion to permit open

redirect examination and defendant has not explained how he was prejudiced by this brief questioning. See *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

Next, defendant argues that the trial court abused its discretion in preventing him from offering exculpatory evidence. We disagree. The trial court prohibited defendant from questioning the emergency room physician about actress Natasha Richardson's death in a skiing accident. Defendant did not show below, and he has failed to explain on appeal, how Richardson's accident, which involved a head injury to an adult while skiing, was relevant to this case, which involved a head injury to a four-month-old child while in a parent's care. The trial court did not abuse its discretion by precluding this testimony as irrelevant. See MRE 401; MRE 402.

Further, contrary to defendant's argument, the trial court did not preclude him from offering evidence that the victim's older sister could have harmed the victim. The court merely required defendant to establish an appropriate foundation for the testimony, after which it permitted the witness to testify that the sister's play activities could have been dangerous to the victim.

We also disagree with defendant's argument that he was improperly prevented from cross-examining the emergency room physician. The court merely ruled that the witness was not required to comment on an opinion of another medical doctor which the witness had not heard. Defendant had the benefit of both expert opinions for the jury to consider in its evaluation of the case.

Next, we find no merit to defendant's unpreserved argument that the emergency room physician, Dr. Matthew Deibel, was not qualified to testify as an expert. A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702. Dr. Deibel testified that he graduated from medical school in 2002 and had worked as an emergency room physician for approximately seven years. He saw approximately 3,000 patients a year, about one-third of whom were children. Given Dr. Deibel's medical education, training, and experience as an emergency room physician, there was no plain error in qualifying him as an expert in emergency medicine. Although defendant contends that Dr. Deibel's testimony was sometimes inconsistent, any alleged inconsistencies affected only the weight of his testimony, not its admissibility or his qualifications as an expert. See *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 101; 776 NW2d 114 (2009). Similarly, to the extent that Dr. Deibel's testimony conflicted with the testimony of the medical examiner, it was up to the jury to determine which expert was more credible.

Defendant also argues that the opinion testimony of a responding paramedic, Yale Miller, was not admissible under MRE 701. However, the record does not disclose that his opinion testimony was offered under MRE 701. Rather, Miller was recognized as an expert in the field of paramedic treatment, so his opinion testimony was admissible under MRE 702. Given the evidence of Miller's training and experience as a paramedic, including the treatment of young children, the trial court did not abuse its discretion in finding that he was qualified to offer expert testimony in that field. Further, any perceived conflicts between the testimony of Miller and the medical examiner did not affect the admissibility of Miller's testimony, and instead were matters for the jury to resolve. See *Ykimoff*, 285 Mich App at 101.

Defendant also argues that the trial court improperly allowed the prosecutor to question witnesses about his emotional state when dealing with financial matters and Ricker about his patience around children. As discussed, these lines of questioning were relevant to the prosecutor's theory of the case. Further, Ricker's testimony was rationally based on her perceptions from her own experiences with defendant and was, therefore, admissible under MRE 701.

B. BINDOVER

Defendant argues that he should not have been bound over for trial on the charge of felony murder because there was reasonable doubt whether he intentionally killed the victim. Defendant did not challenge his bindover in a motion to quash in the trial court, leaving this issue unpreserved. See *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Here, defendant's argument is without merit because the prosecutor was not required to prove the charged crimes beyond a reasonable doubt at the preliminary examination. See *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Rather, the prosecutor was only required to establish probable cause that a felony was committed and that defendant committed the crime. See MCL 766.13; *Reigle*, 223 Mich App at 37. Further, because sufficient evidence to convict was presented at trial, any error in binding defendant over for trial was harmless as a matter of law. See *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002).

C. DEFENDANT'S STATEMENTS

Defendant argues that the trial court erred in denying his motion to suppress his statements to the police. In reviewing a lower court's decision on a motion to suppress evidence, we review the trial court's factual findings for clear error and conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

The prosecution presented evidence of defendant's statements to the police while at the scene and after he was transported to the police station for further questioning. The statements were recorded and the recorded statements were played for the jury. Defendant argues that his statements should have been suppressed because he was not advised of his constitutional rights before questioning and the police continued to question him after he invoked his right to counsel.

The police must advise a defendant of his constitutional rights before conducting a custodial interrogation. *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 3. However, such advice is not required if the defendant is not in custody. *Id.*

In assessing whether a defendant was in custody at the time of the interrogation, courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004), quoting *Stansbury [v California]*, 511 US 318, 322, 325; 114 S Ct 1526; 128 L Ed 2d 293 (1994)]. A key question is whether, under the circumstances, a reasonable person would have felt at liberty to terminate the

interrogation and leave—that is, was there a formal arrest or a restraint on freedom of movement of the degree associated with formal arrest. *Yarborough*, 541 US at 663. [*Vaughn*, slip op at 4.]

The record and video recording of the crime scene reveals that defendant was not in custody when he was questioned by police officers at his home. He was not restrained in any way, and he was free to walk around and smoke a cigarette. Because defendant was not in custody at that point, the police were not required to advise him of his constitutional rights. However, defendant was later handcuffed, placed in a patrol vehicle, and transported to the police station for further questioning. Although defendant was clearly in custody at that point, the record indicates that he was advised of his constitutional rights before further questioning was conducted. Thus, suppression was not required on this ground.

Defendant further argues that his statements at the police station should have been suppressed because the police continued to question him after he invoked his right to counsel during the interview. The police may not continue to question a defendant who invokes his right to counsel during a custodial interrogation, unless the defendant initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Kowalski*, 230 Mich App 464, 478; 584 NW2d 613 (1998), citing *Edwards*, 451 US at 484-485. However, a defendant's invocation of the right to counsel must be unequivocal, as determined by an objective inquiry. *People v McBride*, 273 Mich App 238, 258-259; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008); *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001). If reference to an attorney is ambiguous or equivocal, the cessation of questioning is not required. *Adams*, 245 Mich App at 237-238.

In this case, when a police officer discussed the possibility of defendant submitting to a polygraph examination, defendant stated that he would need an attorney if he was going to take a polygraph, but he did not state that he wanted an attorney at that time. During a police interview, the examining officer indicated that portions of defendant's story were not credible and that defendant had been home alone with the child on other occasions when she was hurt. Defendant explained that he was not at home alone with the child when the remote control was dropped on her head and then said, "What do I got to do? I mean do I need to call a lawyer or something?" The officer responded that defendant should look out for his own best interests. Defendant continued talking to the officer. Later during the same interview, when the officer indicated that defendant's story was "jacked up," defendant said, "Well, then let's call the lawyer then 'cause I gave what I could." The officer said, "That's fine." Defendant then said, "There's no reason for anybody to take me to jail," and the officer responded, "You getting a lawyer's not going to prevent you from going to jail." Again, defendant continued talking to the officer. While defendant referenced calling an attorney on these two occasions, he never clearly requested to call an attorney or have an attorney present. Defendant's statements about calling an attorney were akin to negotiations with the officer, and immediately after making the statements, he continued talking to the officer. Defendant also correctly observes that he made several requests to use a telephone, but none of those requests were made for the stated purpose of contacting an attorney. The trial court found, and we agree, that the record does not establish that defendant made an unambiguous, unequivocal request for counsel.

In sum, the record shows that defendant was not in custody when he made his initial statements at the crime scene and that he was advised of his constitutional rights before further questioning was conducted at the police station. Further, defendant did not make an unambiguous, unequivocal request for an attorney during the police questioning. Accordingly, the trial court did not err in denying defendant's motion to suppress his statements.

Defendant also argues that the trial court erred when it allowed the prosecutor to play his recorded statements for the jury. Defendant contends that because police witnesses had already testified regarding the substance of his statements, the recordings should have been excluded as cumulative under MRE 403 and MRE 404(b)(1). We disagree. First, MRE 404(b) is not applicable because defendant's statements did not involve evidence of other crimes, wrongs, or acts. Second, exclusion was not required under MRE 403. The recordings provided the full context of defendant's statements and also allowed the jury to view defendant's demeanor when making his statements, which the police testimony did not provide. Thus, the evidence was not entirely cumulative. Further, the probative value of the evidence was very high because it involved defendant's own statements concerning the charged crimes. While the evidence was damaging, it was not unfairly prejudicial. Thus, there was no error.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct during his opening statement and closing argument requiring a new trial. We disagree. Because defendant did not object to the prosecutor's conduct, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. See *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and challenged remarks must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). "Opening statement is the appropriate time to state the facts that will be proved at trial." *Ericksen*, 288 Mich App at 200. A prosecutor is afforded great latitude in closing argument and is permitted to argue the evidence and reasonable inferences arising from the evidence in support of his theory of the case. *Bahoda*, 448 Mich at 282-283.

Defendant has not established any misconduct during the prosecutor's opening statement. Although defendant accuses the prosecutor of referring to prejudicial matters during his opening statement, those matters related to testimony properly presented at trial. Further, having reviewed defendant's several claims of misconduct during closing argument, we find no error. Most of defendant's challenges involve the prosecutor's use of strong language to characterize the evidence and reasonable inferences arising from the evidence in support of the prosecutor's theory of the case. Prosecutors may use "hard language" when it is supported by the evidence, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Further, it was not improper for the prosecutor to argue that defendant had the opportunity and motive to conform his testimony to other evidence or testimony in the case. See *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985). Contrary to defendant's argument, the prosecutor did not improperly express his personal

opinion about defendant's guilt. Viewed in context, the challenged remarks were made in reference to the evidence at trial. Defendant also accuses the prosecutor of misquoting and fabricating evidence, but he does not identify the factual basis for this claim. A "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). To the extent defendant disagrees with the prosecutor's characterization of some of the evidence, the trial court protected defendant's substantial rights by instructing the jury that the attorneys' statements were not evidence. See *Bahoda*, 448 Mich at 281. No plain error has been shown.

E. POLICE INVESTIGATION

Defendant argues that the police department's failure to further investigate the crime scene or to develop exculpatory evidence violated his right to due process. However, the police are not under a duty to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Similarly, a prosecutor is not required to perform a defendant's investigative work for him. *People v T aylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Thus, this issue is without merit.

F. JURY INSTRUCTIONS

Defendant also raises several claims of instructional error. These claims are unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764; *People v Martin*, 271 Mich App 280, 350; 721 NW2d 815 (2006).

First, defendant argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. A voluntary manslaughter instruction need only be given as a lesser included offense to murder if supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). Voluntary manslaughter requires evidence of adequate provocation and a killing committed in the heat of passion. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Because there was no evidence of provocation or a heat-of-passion killing in this case, the trial court's failure to instruct on voluntary manslaughter was not plain error.

Next, contrary to defendant's argument, the record discloses that the trial court instructed the jury on motive in accordance with CJI2d 4.9.

Defendant lastly argues that when instructing the jury on the malice element of felony murder, the trial court improperly instructed the jury that it need not be concerned with the intent to kill alternative because the prosecutor was not relying on that state of mind to prove its case. There was no plain error because the prosecutor never claimed that defendant intended to kill the child. Further, the statement benefited defendant because it eliminated a basis for proving his guilt. Thus, the statement did not affect defendant's substantial rights.

G. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of appellate counsel because his appellate attorney did not consult with him before filing a brief on appeal or raise additional

issues that defendant wanted him to pursue. Because defendant did not seek to develop an evidentiary record in support of this issue, our review is limited to errors apparent from the record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The record does not disclose to what extent appellate counsel consulted with defendant before filing his appellate brief. Although appellate counsel raised only a single issue on appeal, an appellate attorney is not ineffective for weeding out weaker arguments and focusing only on issues for which the defendant is most likely to prevail. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Further, defendant has not established that he was prejudiced by his appellate attorney's failure to raise additional issues. Defendant has been afforded the opportunity to raise additional issues in his Standard 4 brief and he has not shown that any of his additional issues have merit. See *id.* at 430-431. Thus, defendant has not shown that he was denied the effective assistance of appellate counsel.

H. CUMULATIVE ERROR

Lastly, defendant has not established that he is entitled to relief because of the cumulative effect of several errors. Although the cumulative effect of multiple errors may require reversal even though a single error, standing alone, does not, *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002), defendant has not established any actual errors that, even cumulatively considered, denied him a fair and impartial trial. See *id.* at 591 n 12 (citation omitted).

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering